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JOHN M. PELKEY
ADMITTED IN D.C. AND VA

May 19, 1998

OUR FILE NO.
1410-101-63

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Plattsmouth and Papillion, Nebraska and
Osceola, Iowa
MM Docket No. 96-95

Dear Ms. Salas:

Transmitted herewith on behalf of LifeStyle Communications Corp. are an original and four copies of an Opposition to Request for Hearing to be filed in the above-referenced proceeding.

If there are any questions concerning this submission, please contact the undersigned directly.

Sincerely,

John M. Pelkey

JMP/ned

Enclosures: (5)

Before The

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments	)	MM Docket No. 96-95
FM Broadcast Stations	)	RM-8787
Plattsmouth and Papillion,	)	RM-8838
Nebraska, and Osceola, Iowa	)	

To: Chief, Allocations Branch
Policy and Rules Division

Opposition to Request for Hearing

LifeStyle Communications Corp. ("LifeStyle"), licensee of KJJC(FM), Osceola, Iowa, hereby opposes the request for hearing filed by Platte Broadcasting Co., Inc. ("Platte"), on May 4, 1998 and, in support of this Opposition, states as follows:

I. Background: The Order to Show Cause.

By Order to Show Cause released March 13, 1998 in the above-captioned proceeding, the Commission directed Platte to explain why KOTD-FM, of which Platte is the licensee, should not be required to change frequency from Channel 295A to Channel 299A in order to accommodate LifeStyle's counterproposal whereby a new channel would be allocated to the community of Papillion, Nebraska. In response, Platte on May 4, 1998 filed a pleading styled as a "Response to Order to Show

Cause and Request for Hearing" (the "May 4 Pleading").[1] Curiously lacking from the May 4 Pleading was any discussion of why KOTD-FM should not be required to change frequency. Platte advanced no public interest factors whatsoever arguing against such a change in frequency. Instead, Platte adopted a novel stance: it attacked the bona fides of LifeStyle's commitment to apply for the new station at Papillion if a station is awarded to that community.

II. That LifeStyle Has Been Willing to Engage in Settlement Discussions With Platte is No Evidence of a Lack of Commitment on LifeStyle's Part to Apply for the Papillion Facility if Allocated.

The sole basis for Platte's claim that LifeStyle's commitment is not genuine is the fact that both Platte and LifeStyle have held sporadic discussions over the last two years looking at a possible settlement of the proceeding. LifeStyle does not deny that it has held settlement discussions with Platte in response to pleas that Platte's President and counsel made to it in August 1996 to see if a settlement could be worked out. But to argue that LifeStyle's willingness to discuss a settlement with Platte is evidence that LifeStyle is not committed to apply for the Papillion facility flies in the face of logic. Such an argument ignores the

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[1] The Order to Show Cause called upon Platte to show why its license for KOTD-FM should not be modified to specify operation on Channel 299. Rather than simply responding to the Order to Show Cause, Platte included as the major portion of its response a motion seeking a hearing at which LifeStyle's character would be investigated.

Section 1.45 of the Commission's rules permits an opposition to such a motion to be filed within 10 days of submission of the motion, with such 10-day period to be extended by an additional three business days pursuant to Section 1.4(h). This Opposition is thus due today, May 19, 1998.

fact that settlements are, by their very nature, discussions of a hypothetical and conjectural nature in which parties necessarily must consider a wide range of possible solutions, including solutions that provide the participants with something less than they have sought in Commission proceedings. Indeed, if parties were unwilling to back off from positions taken in litigation, there would be no settlements.

a. The Commission Actually Encourages Parties to Fully Explore Possible Avenues for Settlement and, Toward That End, Has Made Settlement Discussions Inadmissible in Commission Proceedings.

In recognition of the fact that settlements would be discouraged if parties were not free to explore as wide a range of solutions as possible, the Commission has repeatedly found that settlement discussions are inadmissible in Commission proceedings. Thus, in *RKO General, Inc.* (WHBQ-TV), 2 FCC Rcd. 1626 (1987), the Commission held that any evidence concerning the settlement discussions looking toward the resolution of the RKO proceedings was to be inadmissible. *Id.* at 1627. In a similar vein, the Review Board, in *Lucinda Felicia Paulos*, upheld an Administrative Law Judge's ruling prohibiting cross-examination about statements regarding settlements because "statements made in the context of settlement discussions will not be admitted because they violate the public policy which favors confidentiality of discussions to encourage negotiations and settlements." 8 FCC Rcd 8237, 8238-39 (Rev. Bd. 1993). Thus, even if Platte's claim were logically sound and

LifeStyle's willingness to engage in settlement discussions were in any way probative of LifeStyle's willingness to apply for the new Papillion facility, those settlement discussions are inadmissible.

b. LifeStyle's Willingness to Discuss Settlement With Platte is Not an Abuse of Process.

Confronted with this precedent, Platte is reduced to relying upon the seminal "threat" case of *Gulf Coast Communications, Inc.*,[2] in alleged support of its claim that the efforts of Platte and LifeStyle to settle their differences "disqualifies" (to use Platte's term) LifeStyle's proposal to add a channel at Papillion. As even the most cursory reading of *Gulf Coast* reveals, however, that case is much different than the present one. In *Gulf Coast*, an applicant threatened to bring incriminating facts to the Commission's attention if a competing applicant did not withdraw its application. In the present case, Platte does not even allege, nor could it honestly allege, that LifeStyle engaged in such a threat. Instead, the only result of the parties' inability to reach a settlement has been that, for the last two years, neither party has been able to bring this proceeding to an acceptable conclusion. The continuation of litigation in the absence of a settlement does not constitute a "threat". In fact, in discussing a similar claim, the Review Board correctly explained that the prospect of continued litigation does not constitute a threat:

> Although Anselmo complains that SRBA has engaged in tactics similar to those found to be an abuse of process in

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[2] 81 FCC 2d 499 (Rev. Bd. 1980).

> *Gulf Coast Communications, Inc.*, [cite omitted], his pleadings do not allege a similar threat to disclose unknown substantive offenses unless a favorable settlement is reached; merely a threat of continued litigation. Such a "threat" is always inherent in a settlement failure; no abuse of process is perceived on that score. . . .

Spanish International Communications Corp., 1 FCC Rcd. 92, 95 n.1 (Rev. Bd. 1986), *recon. denied*, 1 FCC Rcd. 844 (Rev. Bd. 1986), *residual proceeding held in abeyance*, FCC 87R-1, 1/26/87; *review denied, order modified on other grounds*, 2 FCC Rcd. 3336 (1987).

Apparently recognizing that its reliance upon *Gulf Coast Communications, Inc.* is without merit, Platte alternatively seeks support in *Margaret J. Hanway* for its claim that LifeStyle's willingness to engage in settlement discussions with it is such an abuse of process that it calls into question the bona fides of LifeStyle's commitment to apply for the Papillion facility. The facts in *Margaret J. Hanway* do not bear the slightest resemblance to the circumstances of the present case, however. In *Margaret J. Hanway*, the parties, who were mutually exclusive applicants for a new facility, actually entered into a settlement. That settlement provided for a buy-out of one of the applicants by the other applicant. The amount to be paid to the dismissing applicant by the surviving applicant would be substantially less if a new application for the facility were filed by a third party after republication. The surviving applicant's husband filed such an application. That conduct was deemed to be an abuse of the Commission's processes. Those types of

shenanigans are not even closely akin to what has transpired in the present case where no settlement has been achieved and where the parties have done no more than engage in settlement discussions.

Platte would have the Commission hold that any settlement discussions looking toward an agreement whereby a party would withdraw its objection to a proposal are inappropriate and that LifeStyle was obligated to report the existence of its settlement discussions to the Commission. In support of this novel proposition, Platte cites *RKO General, Inc.*, 670 F.2d 215 (D.C. Cir 1981). According to Platte, this case holds that LifeStyle was under an "affirmative duty" to advise the Commission of its negotiations "in order to [enable the FCC to] fulfill its statutory mandate."[3] In so arguing, Platte engages in cheap sophistry. The quoted language certainly can be found in the *RKO* decision, but it was not being used to define the obligations of a licensee to inform the Commission of the existence of settlement negotiations. Platte is simply playing the old game of using a sentence that includes two propositions of law and implying that the cited case supports both propositions when, in fact, the case only supports one of the propositions. This is the type of shoddy advocacy to which Platte has been reduced to make a claim that, in fact, is unsupported by any case law.

The simple fact of the matter is that LifeStyle was under no obligation to report the fact that it was engaging in settlement

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[3] May 4 Pleading at 17.

discussions with Platte because, in the absence of a settlement, it has been, and continues to be, committed to applying for the Papillion facility. Platte's claim that LifeStyle never had any intention of pursuing its Papillion proposal and that the proposal was merely an "act of vengeance"[4] is sheer unsupported speculation. In point of fact, the LifeStyle Papillion proposal is one that has a particular attraction to LifeStyle because Papillion neighbors the home town of LifeStyle's President. Moreover, the Papillion facility would be a particularly lucrative facility given the fact that nearly 600,000 persons would be included within the 1 mV/m contour of the station. The fact that LifeStyle has been willing to discuss settlement with Platte stems not from a lack of commitment by LifeStyle to follow through on its proposal but from a recognition that, as the Commission itself has recognized, there simply is no way to accurately forecast the outcome of a rulemaking proceeding. *See TRMR, Inc.*, 3 CR 335, 337 (1996).

Underlying much of Platte's argument is the assumption that LifeStyle's settlement efforts are an abuse of process because the parties discussed a possible monetary payment to LifeStyle. The existence of such a payment would not render the settlement impermissible. Largely glossed over by Platte in the May 4 Pleading is the fact that the current proceeding has two components. One component is LifeStyle's proposal

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[4] May 4 Pleading at 16.

to allocate a new channel to Papillion. The second component is the channel change that Platte sought to force upon LifeStyle and to which LifeStyle timely objected. The *Abuse Order* upon which Platte so heavily relies forecloses payments, in the absence of a waiver, beyond the legitimate and prudent expenses incurred by the dismissing party with respect to a proposal for a new channel. *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911 (1990), *recon. denied*, 6 FCC Rcd 3380 (1991). It does not address the question of the payments that can be made to obtain a station's consent to a channel change and, in fact, the Commission's practice has been to permit the parties to work out the amount of that payment among themselves. That being the case, it is unconscionable for Platte to now argue that the parties' attempts to reach an agreement as to the amount of such payment is evidence of an abuse of process warranting the dismissal of LifeStyle's counterproposal and the commencement of a hearing to examine LifeStyle's qualifications to be a Commission licensee, especially when Platte was the party that first raised the possibility of Platte's making a monetary payment to LifeStyle in return for the dismissal of its objection to the forced channel change.[5]

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[5] Mr. McBride, who is LifeStyle's President, was approached by Charles Warga, Platte's then-President, during the first half of August 1996. Mr. Warga confessed to Mr. McBride that, before he initiated the present proceeding, he should have contacted Mr. McBride to determine whether Platte and LifeStyle could work out an agreement permitting Platte to increase its power through a voluntary channel change by KJJC.

Moreover, even if an agreement to change channels were encompassed within the *Abuse Order*, the fact would remain that the parties would always have been free, if a settlement had been reached, to seek a waiver of the rule. This is precisely what was done by the parties in *Banks, Redmond, Sunriver and Corvallis, Oregon*,[6] which is the very case upon which Platte now relies. In that case, the waiver request was denied. The Commission took no action against the parties for having requested such a waiver, however. Certainly, no allegations were made by the Commission that the contemplation of such a waiver constituted an abuse of the Commission's processes. Indeed, it is difficult to imagine how an abuse of process can be claimed when it is both parties to a proceeding that have been seeking to settle a case.

III. Conclusion.

During the nearly two years that the parties have been attempting to settle this proceeding a number of proposals have been advanced. At no point did LifeStyle threaten Platte. A settlement was not reached. That the parties sought to eliminate their dispute through a settlement in

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Mr. Warga then offered to pay LifeStyle to withdraw its objection to the channel change. Within a few days, Platte's counsel contacted LifeStyle's counsel to determine "what LifeStyle wanted" to withdraw its objection. Thereafter, Mr. Warga and Mr. McBride had numerous discussions looking toward the settlement of the proceeding. The various proposals put forth by the parties would have had Platte buy KJJC, LifeStyle buy KTOD-FM, or even merge Platte and LifeStyle. Most recently, at slightly before midnight on May 3 (i.e., just hours before Platte filed its May 4 Pleading), Platte made yet another offer to LifeStyle to settle the case. Platte's May 4 Pleading appears to have been prompted, not by any effort to sanction an alleged "abuse of process", but by Platte's annoyance with LifeStyle for not having settled with Platte on Platte's terms.

[6] MM Docket No. 96-7 (released April 3, 1998).

no way constitutes an abuse of process. In fact, the Commission so far encourages such settlement discussions that it makes the content of such discussions inadmissible, a fact that Platte has ignored.

For Platte to argue that LifeStyle's willingness to entertain settlement proposals evidences that LifeStyle no longer supports its counterproposal is simply to ignore the very nature of settlement discussions, which necessarily must contemplate a compromise of positions taken before the Commission. Lest there be any confusion, however, LifeStyle restates its commitment to file an application for the Papillion facility if the Commission adopts LifeStyle's counterproposal.

Being without support in fact or in law, Platte's request for hearing must be denied.

Respectfully submitted,

LifeStyle Communications Corp.

By: _____
John M. Pelkey
Its Attorney

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703/841-0606

Date: May 19, 1998

DECLARATION OF JAMES MCBRIDE

I, James McBride, declare under penalty of perjury that the following statement is true and correct:

I am the President of LifeStyle Communications Corp. ("LifeStyle").

LifeStyle is the licensee of KJJC(FM), Osceola, Iowa. On June 17, 1996, LifeStyle submitted to the FCC a counterproposal and opposition to the *Notice of Proposed Rulemaking and Order to Show Cause* in MM Docket No. 96-95. In that submission, LifeStyle opposed the effort of Platte Broadcasting, Inc. ("Platte") to force KJJC(FM) to change channel. It also submitted a counterproposal to Platte's proposal. LifeStyle's counterproposal sought the allotment of Channel 295A to Papillion, Nebraska. Papillion, Nebraska neighbors the town in Nebraska where I was raised.

On June 29, 1996, Platte filed reply comments with respect to the LifeStyle counterproposal. In those reply comments, Platte sought to advance a new counterproposal to LifeStyle's counterproposal. Specifically, Platte proposed that KOTD-FM's community of license be changed from Plattsmouth to Papillion, Nebraska, and that KOTD-FM's class be changed from Class A to Class C3. Platte also proposed that a new channel be allocated to Plattsmouth, Nebraska.

On August 6, 1996, LifeStyle filed supplemental comments in which it pointed out that Platte's counterproposal was untimely filed and could not be considered.

Within days of LifeStyle's submission of the supplemental comments, Charles Warga, who was then Platte's President, called me. He first apologized for not having contacted me prior to the submission of Platte's petition for rulemaking wherein Platte sought to force KJJC to change channel. He then offered to make a monetary payment to LifeStyle in return for the dismissal of its objection to the *Order to Show Cause* and the withdrawal of LifeStyle's counterproposal.

Within a few days of Mr. Warga's phone call to me, Platte's counsel contacted one of my attorneys to find out what LifeStyle wanted in return for a settlement of the proceeding. Subsequent to those calls, Mr. Warga and I had numerous conversations seeking to achieve a settlement. During the course of

those discussions, we discussed the possibility of LifeStyle buying KOTD-FM, of Platte buying KJJC and intermediate steps such as a merger of Platte and LifeStyle.

Despite the discussions that were held over the following 21 months, no settlement was achieved.

On May 3, 1998, I received a telephone call from Mr. Warga shortly before midnight. In that call, Mr. Warga made one last attempt to settle the proceeding. The following day, Platte submitted its response to *Order to Show Cause and Request for Hearing* wherein it argued that LifeStyle engaging in the settlement discussions constituted an abuse of process.

James McBride
President

Date: 5/19/98

CERTIFICATE OF SERVICE

The undersigned, an employee of Haley Bader & Potts P.L.C., hereby certifies that the foregoing document entitled "Opposition to Request for Hearing" was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered, to the following:

Ms. Leslie K. Shapiro*
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Nancy E. Davies

Nancy E. Davies

Date: May 19, 1998

*By Hand